COURT, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1138

ROLAND J. KALB and JEROME L. HEROLD,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM FOR PETITIONERS

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Of Counsel

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The memorandum of the United States in opposition (herein "Memorandum") inadvertently contains factual errors.

1. The Memorandum (p. 2) states that "the Company continued to withhold taxes * * *". The record is clear that the bank advanced only net payrolls and that there was, in fact, no withholding.

2. The Memorandum states (p. 4) that petitioners introduced no evidence to support the contention that petitioners received professional advice that the overpayment of income tax would offset the withholding tax liability. Kalb testified that he believed that the income tax carryforward would be so applied. Herold Ex. 31 id. was prepared by the Company's attorneys and is a Notice of Motion and Petition to Reduce Claim dated November 10, 1960, requesting that the income tax overpayment be

applied to "withholding and F.I.C.A. taxes". While this is after the date the withholding taxes were due, it shows that the attorneys for the Company also believed the overpayment of income taxes would be applied to withholding and F.I.C.A. taxes. Rule 11 F.R.C.P.

3. The accountants' view that the income tax overpayment would be applied to withholding and F.I.C.A. taxes is not, as characterized in the Memorandum (p. 4) "after-discovered". Herold Exs. 9 id, 16 id. and 17 id. show that the accountants were of the view that the overpayment would wipe out the withholding tax liability.

CONCLUSION

The petition for writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

May 9, 1975

Respectfully submitted,

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